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SUPREME COURT, U.S.

No. 08-470

IN THE

# Supreme Court of the United States

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, ET AL, PETITIONERS

*v.*

DOW CHEMICAL COMPANY, ET AL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF

JONATHAN C. MOORE
*Counsel of Record*

*Beldock Levine & Hoffman LLP*
*99 Park Avenue - 16th Floor*
*New York, New York 10016*
*(212) 353-9587*

*Attorneys for Petitioners*

CURRY & TAYLOR • (202) 393-4141

## TABLE OF CONTENTS

Page

Introduction ..... 1

I. Respondents Continue to Mis-Characterized Petitioners' Complaint ..... 1

II. Respondents Fail to Mention that the "Rusk Memo" Includes Statements that the Defoliants would Not be Harmful to Humans Animals or Soil and Approval Was Based On Those Statements ..... 3

III. Respondents' Concession That the Toxic Effects of Dioxin Was Foreseeable Is Inconsistent With The Claim that The Poisoning by Dioxin Was Unintended. ..... 4

IV. This Court Must Make the "Negative" Inference From the Cramer Opinion. ..... 7

V. The Vietnamese Claims Against These Respondents Are Not Preempted ..... 7

CONCLUSION ..... 9

## TABLE OF AUTHORITIES

Page

**CASES**

*American Insurance Ass'n v Garamendi*, 539 U.S. 396 (2003) ..... 8
*Kwan v United States*, 272 F.3d 1360, (Fed Cir 2001) ..... 8

# PETITIONERS' REPLY BRIEF

**Introduction:**

In their Brief in Opposition to the Petition for Writ of Certiorari in this case, Respondents have made various allegations and arguments which require a reply. These points are listed below and are stated in order of their appearance in the Respondents' Brief

## I. Respondents Continue to Mis-Characterized Petitioners' Complaint

Respondents, on page 1, make two blatant mis-characterizations of Petitioner's Complaint. First, they state that "Petitioners are a putative class of Vietnamese nationals . . . who allege that they were injured by exposure to herbicides used by the U.S. military. . ." during the Viet Nam War. As we have argued extensively in our Petition, this formulation misstates the true nature of Petitioners' claims. This is not a case about herbicides, per se, but about an herbicide that knowingly contained an excessive, avoidable and wholly unnecessary poison, dioxin, that has now caused serious injury and death not only to the Vietnamese but to thousands of U.S. veterans who served in that war. Moreover, dioxin was present in the herbicides manufactured by these respondents solely because it cost less to manufacture it in a manner which ensured high levels of dioxin were created in the production process.

Respondents are not the only ones to mis-characterize the complaint this way. Both the District Court and the Court of Appeals engage in the same

factual mis-characterization of the Petitioners' claims. As we have argued in our Petition, this error was such a departure from the accepted and usual course of judicial proceedings that it requires this Court, under its supervisory powers, to summarily reverse the granting of the motion to dismiss the Petitioners international law claims in this case.

The Respondents, also on page 1, knowingly misstate the central assertion in our complaint. That is, that respondents aided and abetted the U.S. Military's alleged commission of War Crimes during the Vietnam War. While it is true that one of petitioner's claims is that the respondents' aided and abetted the violations of the laws of war, which under the Nuremberg Principles [1]are war crimes, petitioners also claim that respondents directly violated the laws of war by providing to the government products they knew contained a very toxic poison, dioxin as they knew it would be used as a poison or poisoned weapon in war..[2] While Petitioners believe aiding and abetting liability is available under Alien Tort Statute, this Court should understand the complaint in this case raises both direct and aiding and abetting liability.

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[1]Principle VI of the Nuremberg Charter defines as War crimes all violations of the laws or customs of war, which the Hague regulations are.

[2]The Nuremburg principles specifically apply to all persons.

## II. Respondents Fail to Mention that the "Rusk Memo" Includes Statements that the Defoliants would Not be Harmful to Humans Animals or Soil and Approval Was Based On Those Statements

On page 2, Respondents repeat the now thoroughly discredited factual assertion that in addition to the Department of Defense recommending use of defoliants, Secretary of State Dean Rusk advised President Kennedy that "successful plant killing ops... can be of substantial assistance in control and defeat of the [Vietcong]." While Rusk claims the advice he received was that the use of defoliants did not violate any rule of international law concerning chemical warfare, it is evident from the full memo and supporting documents, that Rusk as well as others who suggested the use of these defoliants did so only because of their belief that the defoliants were not harmful to humans animals or soil, and that only under those circumstances would the use of such defoliants not violate then accepted customary international law. (See C.A. App 1334-1339[3]). Thus, Rusk assumed, as Cramer had in 1945 that these defoliants were not poisonous to humans, animals or soil, and that only because of that fact they would pass muster under

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[3]For example, the Assistant Director for Far East, Neilson, suggested that for public relations purposes they should have tests on foliage in and around Saigon to demonstrate that the chemicals employed are not harmful to humans and animals. The Joint State-Defense message stated "As our people know from experience, these defoliants of the 2-4 D variety are not harmful to humans and animals. Later in that memo it is stated: "Since defoliant is harmless to personnel and animals, we intend to play it in a low key way..."

international law.

## III. Respondents' Concession That the Toxic Effects of Dioxin Was Foreseeable Is Inconsistent With The Claim that The Poisoning by Dioxin Was Unintended.

Petitioners' have asked for review by this Court in part because the Court of Appeals, while acknowledging that Petitioners have properly alleged a customary international norm prohibiting the purposeful use of poison as a weapon against human beings, (32a), failed to find this norm applicable to the case because it recast the claim into one regarding the mere use of herbicides, not poison, and found that there was no intent to spray poison on human beings. The Court of Appeals never addressed Petitioners' claims that the knowledge of the poison in the herbicide was evidence of intent to poison.

In the Opposition Brief, Respondents have now made a startling admission. Respondents now repeatedly characterize their conduct as one involving the use of a product "to kill vegetation, which use allegedly had **unintended but forseeable toxic** effects on humans."[4] The use of this phrase

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[4]On page 12, Respondents say: " Petitioners have failed to show that there has ever been an international consensus that the 1907 Hague Regulations' proscription on "employ[ing] poison or poisoned weapons" extended so broadly as to prohibit the use of an herbicide to kill vegetation, which use allegedly had **unintended but foreseeable toxic effects on humans**."

"**unintended but forseeable**" is new. Neither the Respondents or the Court ever qualified the term "unintended" with the term "foreseeable". To the extent Respondents acknowledge that the direct toxic

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On page 16 Respondents' say: " Petitioners' central claim is that respondents' provision of Agent Orange to the U.S. military—while allegedly knowing that it contained "unnecessary and excessively high levels of dioxin"—aided and abetted the military's violation of the Hague Regulations' proscription on "poison or poisoned weapons."15 Pet. 2, 9. But a century of state practice refutes petitioners' novel assertion that the poison proscription extends so far as to prohibit the use of an herbicide to kill vegetation, **even if that use has unintended but allegedly foreseeable** toxic effects on humans. And petitioners certainly have not shown that this was the understanding of the poison proscription at the time of the Vietnam conflict.16Like the plaintiff in *Sosa*, petitioners "cite[] little authority that a rule so broad ha[d] the status of a binding ... norm." 542 U.S. at 736."

On page 22, Respondent's say: "Petitioners do not allege that respondents (or the U.S. military) purposefully used Agent Orange to poison human beings. Rather, they allege only that respondents knew that dioxin was toxic to humans and that "precautions in the manufacturing process ... could sharply limit the risk of contamination." C.A. App. 55, 60.22 But as demonstrated by the ICJ's *Nuclear Weapons* opinion, knowledge of poisonous effects is insufficient to violate the poison proscription. Recognizing petitioners' claim of **unintended but foreseeable poisoning** would contravene *Sosa*'s admonition that courts do not have a "mandate to seek out and define new and debatable violations of the law of nations." 542 U.S. at 728."

On page 24 Respondents say: "As the United States explained in its Second Circuit amicus brief ("U.S. Br."), the Cramer and Buzhardt opinions are fully consistent with the government's understanding that the Hague Regulations' poison proscription does not apply to the use of herbicides to destroy foliage and enemy crops, even if such use had **unintended but foreseeable toxic effects** on humans."

effects of the dioxin in herbicides was foreseeable, the Respondents are hard pressed to claim they did not intend the harm. That is, if one knows a harm is foreseeable, but does nothing to prevent it, the harm must have been intended. Given the current concession by Respondents that the harm was foreseeable, it is inconsistent to claim the harm was unintended. The fact that Respondents are conceding the issue of foreseeability is therefore important because it is strong evidence of intentionality.[5]

Moreover, that the toxic effects on humans from the use of their products was forseeable underscores the inappropriateness of dismissal of this case on a motion to dismiss. Petitioners have never been afforded the opportunity to examine defendants on what they knew in terms of foreseeability, when they knew it, and why, in the face of such knowledge, they continued to manufacture and sell to the U.S. military such a toxic substance.

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[5]Respondents quote its expert Reisman who quoted Oeter that the harmful consequences to humans would not render these dioxin laced herbicides illegal as long the intentional design of the material was not to inflict poisoning as a means of combat. The reference to Oeter is a reference to his claims, prior to the ICJ Advisory Opinion on Nuclear Weapons in which he posited that the court should find these weapons banned for reasons contained in International Humanitarian Law regarding inability to distinguish between military targets and civilian targets, based on proportionality, not on whether they were implicitly banned under the poison prescription. He posited the "intentional design" theory. The ICJ did not accept his views and went with a different standard.

## IV. This Court Must Make the "Negative" Inference From the Cramer Opinion.

On pages 24 and 25 Respondents claim there can be no negative inference from the Cramer opinion. That is, Respondents admit that Cramer based his opinion that the use of herbicides in war did not violate international law on the information that the chemicals did not produce poisonous effects upon enemy personnel either from direct contact or indirectly through ingesting plants and vegetables..., Respondents claim the Court cannot infer the negative inference as to what Cramer would have opined if he had been presented with evidence that the herbicides contained a highly toxic substance. This makes no sense. Why would Cramer even mention that he is basing his opinion on facts given to him that the agents were not toxic if that were not an important point? There is no way to read the Cramer opinion other than to find that if he had been told that government intended to use herbicides which contained the highly toxic substance dioxin that he would have opined that they were illegal as they would have been.

## V. The Vietnamese Claims Against These Respondents Are Not Preempted

On page 34 of its brief, Respondents claim that if this court grants the petition of the United States Veterans on the issue of the government contractor defense and rules in their favor, the Vietnamese claims would be preempted in any event.[6] The cases cited for

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[6]Petitioners assume that the Court of Appeals would have agreed with Judge Weinstein that assuming the illegality of the use of

this proposition do not so hold.[7] While it may be true that under certain circumstances, i.e. where the federal government may preempt the field, state actions which interfere may be preempted, the Respondents, argument here is essentially that allowing a state products liability claim by the Vietnamese nationals, when no other foreign national who brought a proper products liability claim would be barred, is based on an allegation that if the US wanted to negotiate with the Vietnamese on this issue, they would have less leverage if the case was going forward. The citation to *Garamendi, supra* for this proposition is not on point.[8]

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these herbicides the government contractor defense would not be available to Respondents. Petitioners also contend that if this Court grants the petitions of the US veterans on this issue, the ruling would apply to the Vietnamese. It is evident from the record below that the District Court and the Court of Appeals assumed that if the US veterans succeeded on the government contractor issue, the Vietnamese Petitioners would as well. In the lower courts the US veterans carried the laboring oar on this issue and the Vietnamese adopted their arguments.

[7]For example, *American Insurance Ass'n v Garamendi*, 539 U.S. 396 (2003) and *Kwan v United States*, 272 F.3d 1360, (Fed Cir 2001) address claims in areas where there are express treaties on the issue which preempted the field.

[8] *Garamendi* involved claims by holocaust survivors who claimed not to have received proceeds of insurance on their relatives do to Nazi confiscation of the proceeds. This issue had been negotiated by the US and Germany after the war and a fund set up as to claims in West Germany. After the reunification of Germany further negotiations resulted in a pool of money being set aside for victims. Persons who claimed not to have been covered by either settlement prevailed upon the California legislature to pass a statute requiring insurance companies doing business in the state to disclose information they had on non paid insurance policies. The insurance companies sued. Based on the facts of the case the

Indeed, this Government and these Respondents from the outset have resisted any claim of responsibility for the use of these herbicides. There is no comprehensive system of compensation which was agreed to which these Petitioners seek to circumvent in this law suit. This case is against chemical companies which introduced into Vietnam herbicides whose content they controlled. The fact that they knew these agents contained, and therefore intended they contained, high levels of the poison dioxin is a products liability issue, which assuming no government contractor defense, petitioners have a right to bring.

## CONCLUSION

This case presents an opportunity for this court to address a very disturbing wrong to Vietnamese citizens who were exposed to dioxin during the war, and their offspring continue to suffer effects. It is often stated that international law is law that protects the weak, and that superpowers are somehow exempt.

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court found a sufficiently clear conflict between HVIRA and the President's foreign policy, as expressed both in the executive agreements with Germany, Austria, and France, and in statements by high-level Executive Branch officials, to require preemption here even without any consideration of the State's interest. The account of negotiations toward those agreements shows that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds and disclosure of policy information, in preference to litigation or coercive sanctions. California has taken a different tack: HVIRA's economic compulsion to make public disclosure, of far more information about far more policies than ICHEIC rules require employs "a different, state system of economic pressure," and in doing so undercuts the President's diplomatic discretion and the choice he has made exercising it.

The Cramer opinion instructed the military and diplomatic leaders to come back to his office for another legal opinion if there was a question about whether proposed defoliants had poisonous effects. These Respondents had a financial interest in not disclosing what they knew and what they learned about the toxicity of dioxin. It was not until 1971 after millions of liters of chemicals had been sprayed and hundreds of pounds of dioxin had landed in Vietnam, and millions of people both in Vietnam and U.S. military had been exposed to this chemical, that Congress asked Defense Department General Counsel, Fred Buzhardt to give an opinion. His opinion mirrored Cramer's opinion and supports Petitioners' claims herein. Unfortunately, this Court cannot turn back the clock and order the government to have gotten a second opinion and demand transparency from these Respondents **before** it started using these defoliants in Vietnam. This Court cannot bring back to life those who have died prematurely nor undo the illnesses, disabilities and birth defects of so many who were exposed or whose parents and grandparents were exposed. The only thing this Court can do, and Petitioners argue must do, is to evaluate the legal claims made in this Petition. Petitioners assert the law they have cited is reason enough to grant the writ.

Respectfully submitted,

Jonathan C. Moore
*Counsel of Record*
Beldock Levine & Hoffman LLP
99 Park Avenue - 16th Floor
New York, New York 10016
(212) 353-9587

Constantine Peter Kokkoris
Constantine P. Kokkoris,
225 Broadway
Suite 612
New York, NY, 10007
212-349-9340

Robert Bryan Roden.
Shelby Roden LLC
2956 Rhodes Circle
Birmingham AL, 35205
205-933-8383

Jonathan Wayne Cartee
Cartee & Morris, LLC
1232 Blue Ridge Boulevard
Birmingham, AL, 35226
205-263-0333

D. Frank Davis
John E. Norris
Davis & Norris, LLP
2151 Highland Ave
Suite 100
Birmingham , AL, 35205
205-930-9900

Kathleen Anne Melez
Law Office of Kathleen A. Melez
13101 Washington Blvd.
Suite 463
Los Angeles, CA, 90066
310-566-7452